No. 05-0101

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In The

Supreme Court of the United States

MORTON BERGER,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To The Arizona Supreme Court

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ARIZONA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to defending and preserving the individual rights and liberties guaranteed by the Constitution and the laws of the United States. The Arizona Civil Liberties Union Foundation of Arizona (ACLU-AZ) is one of the ACLU's statewide affiliates. Since its founding in 1959, the ACLU-AZ has appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU-AZ has participated in cases involving the proper interpretations of the scope and meaning of the Eighth Amendment's prohibition against cruel and unusual punishment. Because this case raises important Eighth Amendment questions, its proper resolution is a matter of great concern to the ACLU, its affiliates and its members.

ARGUMENT

The Arizona Supreme Court concluded that it was required by this Court's precedents to analyze Berger's two-hundred-year sentence as if it were a ten-year sentence. In ACLU-AZ's view, the petition for certiorari is correct in asserting that the Arizona Supreme Court misinterpreted this Court's prior decisions, including *Lockyer v. Andrade*, 538 U.S. 63 (2003). If ACLU-AZ is

[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for the *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members or its counsel made a monetary contribution to this brief.

correct in that regard, there is obviously potential for confusion in the case law. This Court should dispel that confusion.

If ACLU-AZ is wrong, and this Court's prior decisions do require that Eighth Amendment analysis be a stylized exercise with little regard for reality, the rules established by those decisions should be reconsidered.

CONCLUSION

For the reasons stated herein, the American Civil Liberties Union Foundation of Arizona urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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